

**STATE OF ILLINOIS**

**ILLINOIS COMMERCE COMMISSION**

Illinois Commerce Commission )  
On Its Own Motion )  
 )  
vs. ) Docket No. 03-0703  
 )  
Northern Illinois Gas Company )  
d/b/a Nicor Gas Company )  
 )  
Reconciliation of revenues collected under )  
gas adjustment charges with actual costs )  
prudently incurred. )

**NICOR GAS COMPANY’S RESPONSE  
TO THE CORRECTED  
MOTION TO STRIKE OF THE CITIZENS UTILITY BOARD**

Northern Illinois Gas Company d/b/a Nicor Gas Company (“Nicor Gas” or the “Company”), pursuant to Section 200.190 of the Illinois Commerce Commission’s (“Commission”) Rules of Practice, 83 Ill. Adm. Code § 200.190, submits this Response to the Citizens Utility Board’s (“CUB”) Corrected Motion to Strike (“Motion”) portions of the Company’s Reply Brief. For the reasons set forth below, the Motion should be denied.

**I. INTRODUCTION**

The Motion seeks to strike six sentences from Nicor Gas’ Reply Brief relating to the Commission’s final Order in the proceeding involving the Company’s Gas Cost Performance Program (“GCPP”), *Illinois Commerce Comm’n v. Northern Illinois Gas Company d/b/a Nicor Gas Company*, Docket Nos. 01-0705, 02-0067, 02-0725 (consol.), Order (June 5, 2013) (“GCPP Order”), and the Second District Appellate Court’s opinion affirming the Commission’s GCPP Order, *Citizens Util. Bd. v. Illinois Commerce Comm’n*, 2015 IL App (2d) 130817 (filed May 14, 2015) (“Appellate Court Opinion”). Motion at 5 (quoting Nicor Gas Reply Br. at 3-4, 13).

CUB does not dispute that the Appellate Court Opinion affirms the GCPP Order. Motion at 4. Instead, CUB asserts that the six sentences at issue should be stricken as the Company’s “reference to and conclusions based on” the Appellate Court Opinion “are a misstatement of law,” “inapposite to this proceeding,” and do not provide CUB with an opportunity to respond.<sup>1</sup> These arguments are meritless. Each of the challenged sentences in Nicor Gas’ Reply Brief is part of fair and proper argument based on the evidence and the law. The Motion should, therefore, be denied.

It is the Commission’s role to weigh the evidence and to assess legal arguments and reach conclusions of law. The deference that a court will accord the Commission’s findings of fact and conclusions of law differs, but it is the Commission’s role to assess legal arguments such as those made in Nicor Gas’ Reply Brief. The Administrative Law Judge (“ALJ”) addressed the sequencing of evidence and legal arguments in this proceeding in granting CUB’s Motion to Strike Nicor Witness Elliott’s Surrebuttal Testimony. March 16, 2015 ALJ Notice of Ruling. The ALJ’s Ruling specifically concluded that the matters addressed in that testimony, including discussion of the applicability of prior Commission Orders, were “arguments [that] should be addressed by Nicor and the other parties in their legal briefs.” *Id.*

Further, the Commission’s Rules of Practice provide parties with an opportunity to argue fully their positions to the Commission. *See, e.g.*, 83 Ill. Adm. Code § 200.800. Appellate courts presented with requests to strike briefs have made clear that striking a portion of a brief “is a harsh sanction,” appropriate only if the challenged argument “interferes with or precludes” appellate review. *People v. Howard*, 233 Ill. 2d 213, 224 (2009). The six sentences of Nicor

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<sup>1</sup> Although the Illinois Attorney General (“AG”) joined with CUB in post-hearing briefs, the AG did not join the Motion.

Gas' Reply Brief that reference the Appellate Court Opinion do not interfere with the Commission's review of the evidence and legal arguments here and they should not be stricken.

## II. ARGUMENT

The first four sentences that CUB challenges, found on pages 3-4 of Nicor Gas' Reply Brief, are as follows:

Of course, CUB/AG's claim concerning the impact of the Company's Hub activities on sales customers is not new. In recently rejecting CUB's appeal of the Commission's Order in Docket Nos. 01-0705, 02-0067, 02-0725 (consol.), the Second District Appellate Court affirmed the Commission's rejection of an almost identical CUB claim in that proceeding, where CUB asserted that Nicor Gas' provision of Hub services reduced storage inventory for customers. *Citizens Util. Bd. v. Illinois Commerce Comm'n*, 2015 IL App (2d) 130817, ¶ 54 (filed May 14, 2015). As Nicor Gas indicated in its Initial Brief, CUB's testimony in this proceeding concerning the impact of Hub activities on sales customers is almost identical to the testimony the Commission rejected in Docket Nos. 01-0705, 02-0067, 02-0725 (consol.). Nicor Gas Init. Br. at 4, citing *Illinois Commerce Comm'n v. Northern Illinois Gas Company d/b/a Nicor Gas Company*, Docket Nos. 01-0705, 02-0067, 02-0725 (consol.), Order (June 5, 2013) ("GCPP Order"). Given no basis to alter the Commission's prior conclusion, CUB's (and now also the AG's) claim concerning the impact of the Hub activities on the Company's sales customers should be rejected again.

Motion at 5 (quoting Nicor Gas Reply Br. at 3-4).

As noted in the Motion, Nicor Gas relied upon the GCPP Order in its Initial Brief in this proceeding. Motion at 2. Nicor Gas noted that the Commission "rejected an almost identical claim by Mr. Mierzwa" in the GCPP Order regarding improper use of the Company's storage inventory, including through the use of Hub services, because "no definitive evidence was presented." Nicor Gas Init. Br. at 4, 19 (quoting GCPP Order at 16-17). Nicor Gas further noted that Mr. Mierzwa "failed to present definitive evidence" here and that his direct testimony in this proceeding "is nothing more than a reprise of his failed position in the GCPP proceeding." *Id.* (citing Mierzwa Dir., CUB Ex. 1.0, 3:49-67, 4:77-6:127 with Mierzwa Reb., CUB Ex. 2.0 Rev., 42:944-45:1007 in Docket Nos. 01-0705, 02-0067, and 02-0725 (consol.)).

In its Reply Brief, Nicor Gas responded to CUB's assertions that Mr. Mierzwa's testimony demonstrated that the Company's use of Hub services in 2003 was imprudent. *See* CUB Init. Br. at 6-8; Nicor Gas Reply Br. at 1-4, 12-26. In pertinent part, Nicor Gas noted that Mr. Mierzwa's testimony in this proceeding is almost identical to the testimony he gave in the GCPP proceeding and that CUB had provided no evidence to alter the Commission's prior conclusion regarding the impact of Hub activities on sales customers. Nicor Gas Reply Br. at 3-4. In support of this point, Nicor Gas included a citation to the Appellate Court Opinion, which became available when the Second District Appellate Court filed the opinion on May 14, 2015.

CUB argues that it had no opportunity to respond to Nicor Gas' citation to the Appellate Court Opinion. Motion at 5. Yet, as CUB emphasizes in the Motion, CUB had the opportunity in its Reply Brief to explain its position that the Commission's decision in the GCPP Order is inapposite to this proceeding. Motion at 2-3, 5; CUB Init. Br. at 8-11. CUB has not been prejudiced by the Company's citation to the Appellate Court Opinion because, as CUB recognizes, the Second District Appellate Court affirmed the Commission's GCPP Order and CUB further states that it "did fully rebut the Company's attempts ... to analogize the facts in this proceeding to those in the GCPP proceeding." Motion at 2-4, 5.

In addition, CUB challenges the four sentences excerpted above on the basis that they allegedly include "misstatements of the law." Motion at 6. As previously noted, CUB agrees that the Appellate Court Opinion affirms the Commission's GCPP Order. Motion at 4. Thus, Nicor Gas made no misstatement in its Reply Brief of the legal significance of the Appellate Court Opinion. Instead, CUB appears to take issue with the statement that the Commission already has rejected an almost identical claim by CUB witness Mr. Mierzwa in the GCPP Order.

Motion at 6. CUB articulated its opposition to this statement in its Reply Brief, arguing that Nicor Gas “is wrong that Mr. Mierzwa’s recommendations in Docket No. 02-0067 were ‘almost identical’ to his recommendations here.” CUB Reply Br. at 8-11. *See also* Motion at 3-4. Therefore, CUB already has addressed the point in its Reply Brief. It is not particularly notable, nor surprising, that CUB and Nicor Gas disagree on the description of Mr. Mierzwa’s claims. And, the mere fact that CUB and Nicor Gas disagree does not turn Nicor Gas’ statements in briefing into “misstatements of law.”

CUB further argues that the Appellate Court Opinion is not “precedential” here because there are different requirements set forth in Sections 9-244 and 9-220 of the Public Utilities Act and different standards for Commission review under each statute. Motion at 6-7. This argument misses the point of the challenged sentences in Nicor Gas’ Reply Brief, which is that Mr. Mierzwa failed to provide “definitive evidence” in support of his claims in both the GCPP proceeding and this proceeding. Nicor Gas Reply Br. at 3-4. For the same reason, there is no merit to CUB’s argument that Nicor Gas somehow acknowledged in appellate court filings that the legal analysis in the GCPP proceeding is inapposite to the Commission’s review here. Motion at 6-7. CUB must present sufficient evidence to support its claims regardless of the legal analysis applied by the Commission.

CUB also attempts to distinguish the Appellate Court Opinion by arguing that Mr. Mierzwa’s proposed disallowance here is different from the “tangential” and “peripheral” claim that he made in the GCPP proceeding. Motion at 7-8. CUB could have made that argument in its Reply Brief when it was explaining why the GCPP proceeding is inapposite here, but it failed to do so. In this regard, the Motion serves as an improper reply to Nicor Gas’ Reply Brief.

Finally, the last two sentences of Nicor Gas' Reply Brief that CUB challenges are in direct response to the arguments of CUB/AG and Staff attempting to diminish the testimony of Nicor Gas witness Christopher Gulick by describing him as "an outside consultant" without "personal knowledge of the events that took place in 2003." CUB/AG Init. Br. at 3; Staff Init. Br. at 12. In response to these assertions, Nicor Gas noted that neither Staff's witness nor CUB's witness has any personal knowledge of Nicor Gas' actions in 2003 and, unlike Mr. Gulick, neither witness has any experience in managing gas supply operations and storage assets. Nicor Gas Reply Br. at 13. Nicor Gas continued, "CUB/AG's and Staff's attempts to impugn Mr. Gulick's credibility further fall flat given the recent Second District Appellate Court opinion rejecting CUB's appeal of the GCPP Order" as "the Appellate Court addressed the witness testimony provided on behalf of Nicor Gas and concluded that the testimony of Mr. Gulick, among others, provided 'substantial evidence to support the Commission's determination.'" *Id.* (citing *Citizens Util. Bd.*, 2015 IL App (2d) 130817, ¶¶ 48-54). Thus, Nicor Gas properly responded to the attacks on Mr. Gulick's credibility by referencing the Appellate Court Opinion's discussion of witness testimony, including Mr. Gulick's, in the GCPP proceeding.

To the extent that CUB suggests that Nicor Gas should have raised this argument earlier, CUB would improperly require Nicor Gas to anticipate and respond to specific arguments before they are made in Initial Briefs. The law is clear that Nicor Gas need not have anticipated and responded in advance to all arguments against its position that other parties could conceivably make. Such a requirement would impose an unrealistic burden, unduly lengthen Initial Briefs, and potentially confuse the issues by introducing and refuting arguments that no other party may ever make. The Supreme Court of Illinois has recognized the impropriety of any such requirement: "It would be unfair for us to require an appellant, when writing his or her opening

brief, to anticipate every argument that may be raised by an appellee.” *People v. Whitfield*, 228 Ill. 2d 502, 514 (2007) (citing *Oliveira v. Amoco Oil Co.*, 311 Ill. App. 3d 886, 891 (4<sup>th</sup> Dist. 2000), *rev’d in part on other grounds*, 201 Ill. 2d 134 (2002) (“An appellee may argue any point supported by the record but an appellant is under no obligation to anticipate every argument an appellee might raise and address it in his opening brief.”)).

WHEREFORE, Northern Illinois Gas Company d/b/a Nicor Gas Company respectfully requests that the Administrative Law Judge deny CUB’s Corrected Motion to Strike portions of its Reply Brief and grant such further relief as deemed just and appropriate.

Dated: June 18, 2015

Respectfully submitted,

NORTHERN ILLINOIS GAS COMPANY  
D/B/A NICOR GAS COMPANY

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**CERTIFICATE OF SERVICE**

I, Anne W. Mitchell, certify that I caused a copy of Nicor Gas Company's Response to the Corrected Motion to Strike of the Citizens Utility Board to be served upon the service list in Docket No. 03-0703 by electronic mail, on the 18<sup>th</sup> day of June, 2015.

/s/ Anne W. Mitchell  
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